Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION FOR REVIEW NO 08(RS)-1–03 OF 2020(W)
ABDUL RAHMAN SEBLI, ZALEHA YUSOF, ZABARIAH YUSOF, HASNAH HASHIM, MARY LIM, HARMINDAR SINGH AND RHODZARIAH BUJANG FCJJ
22 OCTOBER 2020

Civil Procedure — Inherent powers — Federal Court — Review of Federal Court's decision — Federal Court declined to answer constitutional questions on grounds that questions were abstract, academic, and hypothetical — Applicant filed application pursuant to r 137 of the Rules of the Federal Court 1995 and inherent jurisdiction of court to set aside decision of Federal Court — Whether Federal Court had jurisdiction to review its own decision — Whether denial of right to be heard could constitute a ground for review — Whether applicant suffered grave injustice — Whether applicant had alternative remedy — Whether order for rehearing would be an exercise in futility — Courts of Judicature Act 1964 ss 84 & 85 — Rules of the Federal Court 1995 r 137

The applicant had filed originating summons ('the OS') which substantially sought a declaration to the effect that the National Security Council Act 2016 ('the NSCA 2016') was unconstitutional ('the constitutional questions'). The High Court, by way of special case pursuant to s 84 of the Courts of Judicature Act 1964 ('the CJA') referred the constitutional questions for the determination of the Federal Court. The Federal Court, by majority, declined to answer the constitutional questions referred to the court on the grounds that the questions were abstract, academic, and hypothetical ('the FC's decision'). The case was subsequently remitted to the High Court for the determination of the OS. Aggrieved by the decision, the applicant had filed the present application ('the application') pursuant to r 137 of the Rules of the Federal Court 1995 and the inherent jurisdiction of the court to set aside the FC's decision. The issues for determination in the present case were in relation to: (a) the jurisdiction of the Federal Court to review its own decision; and (b) the circumstances in which denial of the right to be heard could constitute a ground for such review warranting a rehearing.

Held, granting the application with no order as to costs, setting aside the FC's decision and ordering that the special case to be fixed for rehearing:

(1) It was settled law that the Federal Court, being the highest court in the land, and the court of last resort, had the inherent jurisdiction, irrespective of any statutory provision, to prevent injustice and abuse of

process. Although the court appreciated that its jurisdiction to review was extremely limited and may only be exercised in very exceptional circumstances, nevertheless, in the rarest of rare cases, where the final judgment complained of had caused grave injustice, the court was obliged to rectify the error. In such a case, the public interest of ensuring justice was done must take precedence over the interest of certainty and finality. This would also be in keeping with the overriding public interest that there should be confidence in the administration of justice. Confidence was paramount. It could not be gainsaid that public support and confidence was critical for the proper and effective functioning of the administration of justice. A lack of trust would certainly weaken the institution and diminish its role in protecting the Federal Constitution (see paras 27, 35–36, 43 & 90).

(2) The Federal Court, being the court of last resort, had the jurisdiction and power to review its own decisions in the case of breach of natural justice, whether it was a case of a breach of the bias rule or the breach of the right to be heard. In the present case, the applicant was not given notice as well as the opportunity to answer the issues of whether the constitutional questions were academic and his locus standi to bring the action. In the circumstances, a case for breach of natural justice had been made out by the applicant in that the audi alteram partem rule had not been observed. Further, the applicant had proven that the breach had resulted in a grave injustice to him because he had no alternative remedy. He was not entitled to file any further proceedings on the same issue as the matter was res judicata. In fact, the majority decision indicated that only a person whose rights had been adversely affected or threatened to be affected could challenge the constitutionality of the NSCA 2016. In effect, not only the applicant but any other person similarly circumstanced as the applicant would be estopped from doing so. In addition, even though the case was remitted to the High Court, the High Court was bound by the FC's decision pursuant to s 85 of the CJA and could not decide in a different fashion (see paras 46, 55, 76, 82–84 & 89).

(3) The question of whether an order for a rehearing would be an exercise in futility did not arise in the present case in view of the attendant facts and circumstances. The court was in no position to decide, at this point, if the outcome would have been the same if the applicant had been heard on the issue because the court only had the submissions of the applicant and the respondents had chosen not to submit on this issue. Considering that in the two dissenting judgments, for their respective reasons, it was found that the questions referred to were not academic and the applicant had locus standi. This supported the applicant's position that this particular issue merited at least full and serious arguments with the benefit of submissions by both parties (see paras 85–87).

[Bahasa Malaysia summary

Pemohon telah memfailkan saman pemula ('SP') yang pada dasarnya memohon deklarasi bahawa Akta Majlis Keselamatan Negara 2016 ('AMKN 2016') adalah tidak berperlembagaan ('persoalan perlembagaan'). Mahkamah Tinggi, melalui kes khas menurut s 84 Akta Mahkamah Kehakiman 1964 ('AMK') merujuk persoalan perlembagaan tersebut untuk penentuan Mahkamah Persekutuan. Mahkamah Persekutuan, secara majoriti, enggan menjawab persoalan perlembagaan yang dirujuk kepada mahkamah atas alasan persoalan tersebut adalah abstrak, akademik, dan hipotesis ('keputusan MP'). Kes tersebut kemudiannya dikembalikan ke Mahkamah Tinggi untuk penentuan SP. Terkilan dengan keputusan tersebut, pemohon telah memfailkan permohonan semasa ('permohonan tersebut') menurut k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 dan bidang kuasa sedia ada mahkamah untuk mengenepikan keputusan MP. Isu-isu untuk penentuan dalam kes ini adalah berhubung dengan: (a) bidang kuasa Mahkamah Persekutuan untuk menyemak keputusannya sendiri; dan (b) keadaan di mana penafian hak untuk didengar boleh menjadi alasan bagi semakan tersebut yang mewajarkan perbicaraan semula.

Diputuskan, membenarkan permohonan tersebut tanpa perintah berkenaan kos, mengenepikan keputusan MP dan memerintahkan agar kes khas tersebut ditetapkan untuk perbicaraan semula:

(1) Sudah menjadi undang-undang yang mantap bahawa Mahkamah Persekutuan, sebagai mahkamah tertinggi di negara ini, dan mahkamah rayuan terakhir, mempunyai bidang kuasa sedia ada, tanpa mengira apa-apa peruntukan berkanun, untuk mencegah ketidakadilan dan penyalahgunaan proses. Walaupun mahkamah menghargai bahawa bidang kuasanya untuk menyemak adalah sangat terhad dan hanya boleh dilaksanakan dalam keadaan yang sangat luar biasa, namun, dalam kes yang jarang berlaku, di mana penghakiman terakhir yang diadukan telah menyebabkan ketidakadilan yang serius, mahkamah bertanggungjawab untuk membetulkan kesilapan tersebut. Dalam kes sebegini, kepentingan awam untuk memastikan keadilan ditegakkan mesti diutamakan daripada kepentingan kepastian dan kemuktamadan. Ini juga selaras dengan kepentingan awam yang utama bahawa harus ada keyakinan dalam pentadbiran keadilan. Keyakinan adalah yang utama. Tidak dapat dinafikan bahawa sokongan dan keyakinan orang ramai adalah penting untuk menjalankan pentadbiran keadilan dengan betul dan berkesan. Kekurangan kepercayaan sudah tentu akan melemahkan institusi keadilan dan mengurangkan peranannya dalam melindungi Perlembagaan Persekutuan (lihat perenggan 27, 35–36, 43 & 90).

(2) Mahkamah Persekutuan, sebagai mahkamah rayuan terakhir, mempunyai bidang kuasa dan kuasa untuk menyemak keputusannya

sendiri dalam kes pelanggaran keadilan semula jadi, sama ada ia adalah kes pelanggaran prinsip berat sebelah atau pelanggaran hak untuk didengari. Dalam kes ini, pemohon tidak diberi notis serta peluang untuk menjawab sama ada persoalan perlembagaan tersebut telah menjadi akademik dan berkenaan locus standi pemohon untuk membawa tindakan tersebut. Dalam keadaan tersebut, kes pelanggaran keadilan semula jadi telah dibuktikan oleh pemohon kerana prinsip audi alteram partem tidak dipatuhi. Selanjutnya, pemohon telah membuktikan bahawa pelanggaran telah mengakibatkan ketidakadilan yang serius terhadapnya kerana dia tidak mempunyai remedi alternatif. Dia tidak berhak memfailkan apa-apa prosiding lanjut berhubung isu yang sama kerana perkara tersebut sudah menjadi res judicata. Malah, keputusan majoriti menunjukkan bahawa hanya seseorang yang haknya telah terjejas teruk atau diancam untuk terjejas boleh mencabar keperlembagaan AMKN 2016. Sebenarnya, bukan sahaja pemohon tetapi mana-mana orang lain yang mengalami keadaan yang sama dengan pemohon juga akan dihalang daripada berbuat demikian. Di samping itu, walaupun kes tersebut telah dikembalikan kepada Mahkamah Tinggi, Mahkamah Tinggi terikat dengan keputusan MP tersebut menurut s 85 AMK dan tidak boleh membuat keputusan yang berbeza (lihat perenggan 46, 55, 76, 82–84 & 89).

(3) Persoalan sama ada perintah untuk perbicaraan semula akan menjadi sia-sia tidak timbul dalam kes ini berdasarkan fakta dan keadaan yang ada. Mahkamah tidak boleh membuat keputusan, pada ketika ini, sama ada mahkamah akan membuat keputusan yang sama jika pemohon telah didengar mengenai isu tersebut kerana mahkamah hanya mempunyai hujahan pemohon dan responden telah memilih untuk tidak memberikan hujahan berkenaan isu ini. Dalam dua penghakiman yang menentang, atas alasan masing-masing, didapati bahawa persoalan yang dirujuk adalah bukan akademik dan pemohon mempunyai locus standi. Ini menyokong pendirian pemohon bahawa isu ini memerlukan sekurang-kurangnya hujah yang lengkap dan serius dengan kelebihan penghujahan oleh kedua-dua pihak (lihat perenggan 85–87).]

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Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd & another application [2005] 3 MLJ 1; [2004] 4 CLJ 350, FC (refd)

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Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)
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Mega Sasa Sdn Bhd v Kinta Bakti Sdn Bhd & Ors [2020] 10 MLJ 409; [2020] 4 CLJ 201, HC (refd)

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TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) v Director of Forest, Sarawak & Anor and other appeals [2019] 6 MLJ 141, FC (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)
Taylor and another v Lawrence and another [2002] 2 All ER 353; [2002] EWCA Civ 90; [2003] QB 528, CA (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765; [2014]6 CLJ 541, FC (refd)
Uddin (a child) (serious injury: standard of proof), Re [2005] 3 All ER 550, CA (refd)

Legislation referred to

Federal Constitution arts 4(1), 5(1), 8(1), 9, 121, 149, Part II
Courts of Judicature Act 1964 ss 84, 85
National Security Council Act 2016
Rules of the Federal Court 1995 rr 33, 137

Appeal from: Civil Reference No 06(RS)-1–03 of 2019(W) (Federal Court, Putrajaya)

Gopal Sri Ram (Leela Jesuthasan, How Li Nee and Marcus Lee with him) (Chambers of Leela J) for the applicant.
Suzana Atan (Kogilambigai a/p Muthusamy with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Harmindar Singh FCJ (delivering judgment of the court):

INTRODUCTION

[1] This application raises two important questions. The first pertains to the jurisdiction of this court to review its own decisions which have been heard and decided. The second concerns the circumstances in which denial of the right to be heard can constitute a ground for such review warranting a rehearing.

[2] The application (encl 1) was filed pursuant to r 137 of the Rules of the Federal Court 1995 ('the RFC 1995') and the inherent jurisdiction of the court to set aside an earlier decision of this court. The decision which is the subject matter of the complaint is the majority decision of this court dated 11 February 2020, where the court declined, by majority, to answer the constitutional questions referred to the court on the grounds that the questions were abstract, academic and hypothetical. These constitutional questions were referred by special case from the High Court pursuant to s 84 of the Courts of Judicature Act 1964 ('the CJA 1964').

[3] We heard the instant application on 10 September 2020. The primary legal issue confronting us was whether there was a breach of natural justice and if so, whether it had resulted in a grave injustice such that a review of our earlier decision was warranted. After having read the written submissions as well as hearing oral arguments on the issues raised, we were of the unanimous view that this was a fit and proper case for review. Accordingly, we set aside our earlier decisions and ordered the special case to be fixed for rehearing. We now provide our reasons which will represent the judgment of this court.

THE FACTUAL BACKGROUND

[4] The relevant facts leading to the filing of the present application are extensively set out in the court documents which include the submissions of the parties and the previous judgments of this court. In the context of the instant application, it is sufficient for our purpose to restate the following background facts as revealed in the said documents.

[5] The proceedings began when the applicant, on 2 August 2016, filed an originating summons ('the OS') at the Kuala Lumpur High Court. The applicant, at the time, was in prison serving his sentence. He later became, and is currently, a Member of Parliament. The OS substantially seeks a declaration to the effect that the National Security Council Act 2016 ('the NSCA 2016') is unconstitutional. For completeness, the reliefs sought are as follows:

(a) a declaration that s 12 of the Constitution (Amendment) Act 1983 (A566), s 2 of the Constitution (Amendment) Act 1984 (A584) and s 8 of the Constitution (Amendment) Act 1994 (A885) are unconstitutional, null and void and of no effect;

(b) a consequential declaration that art 66(4) and 66(4A) of the Federal Constitution (Amendment) Act 1994 (A885) are unconstitutional, null and void and of no effect;

(c) a declaration that the NSCA 2016 is unconstitutional, null and void and of no effect; and

(d) a perpetual injunction to restrain the second defendant from taking any steps or acting on the NSCA 2016.

[6] At the hearing before the High Court, two preliminary objections were raised against the suit. The objections were:

(a) that the High Court has no jurisdiction to determine this dispute as the subject-matter of the challenge is for the exclusive jurisdiction of the Federal Court; and

(b) that the applicant does not have locus standi to maintain this suit.

[7] At the hearing, Hanipah Farikullah J (now JCA) sustained the first preliminary objection considering herself bound by the judgments of this court in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; [2014]6 CLJ 541 ('Titular Roman Catholic') and *State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors* [2015] 6 MLJ 736; [2015] 8 CLJ 975; [2015] 6 MLJ 736 ('Juzaili') which judgments held that challenges such as these would have to be initiated directly at the Federal Court (see *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor* [2017] MLJU 338). On the second preliminary objection concerning the issue of locus standi, no remark or ruling was made by the learned judge.

[8] On appeal to the Court of Appeal, the same preliminary objection was sustained premised on the principle of stare decisis. The appeal was accordingly dismissed. No issue on locus standi was raised there by the parties (see *Datuk Seri Anwar bin Ibrahim v Kerajaan Malaysia & Anor* [2018] MLJU 289).

Dissatisfied, the applicant filed a motion for leave to appeal to this court. As it turned out, on or about the hearing of the leave motion, this court had rendered its judgment in *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417; [2018] 4 CLJ 1 ('Gin Poh Holdings') which had the effect of overruling our two earlier decisions of *Titular Roman Catholic* and *Juzaili*. As a consequence, the judgments of the High Court and the Court of Appeal dismissing the present reference could no longer be sustained.

[9] At the hearing of the leave motion at this court, and having now the benefit of the judgment in *Gin Poh Holdings*, parties now agreed that the High Court had the jurisdiction to determine the dispute. Accordingly, the matter was remitted to the High Court for the determination of the OS.

[10] With the matter now back in the High Court, and this time before Nordin Hassan J (now JCA), the applicant filed a reference application for the same to be transmitted to this court pursuant to s 84 of the CJA 1964 and r 33 of the RFC 1995. No objection was raised on this occasion by the respondent. Further, and notably so, the locus standi point appeared to have been abandoned completely. The High Court acceded to the application. With the consent of the parties, the High Court, on 14 March 2019, by way of special case pursuant to s 84 of the CJA 1964, referred the constitutional questions alluded to earlier (at [5]) for the determination of this court.

[11] Now before this court, a panel of seven judges heard the reference on 6 August 2019. At the commencement of the reference hearing, a question was posed by the court to the learned counsel for the applicant and respondent, as to whether the threshold of s 84 of the CJA 1964 had been met and whether the court is bound to answer the constitutional questions. The applicant submitted that the OS is the substantive matter left at the High Court and the OS was to be disposed according to the decision of this court. The respondents appeared not to have put forward any response on this point.

[12] On 11 February 2020, a decision on the reference was delivered by this court whereby the majority of five declined to answer the constitutional questions on the ground that they were abstract, academic, and hypothetical. In this context, the majority noted:

> 43. The key question is thus whether there is a real and actual controversy between the parties which will *affect* their rights and interests. Conceptually, the question is inextricably intertwined the test of locus standi, which requires a party to have been 'adversely affected' in the sense that they have a 'real and genuine interest in the subject matter' ...
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> ...
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> 64. In the absence of an actual controversy affecting the rights of parties, the

constitutional questions referred to us are abstract and purely academic. The questions have not become academic due to some change in the factual substratum; they were academic for there was no real dispute underlying them to begin with. They exist in a complete factual vacuum in the case before us.

[13] The minority, through two separate dissenting judgments, answered the reference constitutional questions and on the principal issues held:

(a) that the amending provisions are constitutional as they do not violate the basic structure of the Federal Constitution;

(b) the NSCA 2016 is unconstitutional, null and void as it was not enacted in accordance with art 149 of the Federal Constitution; and

(c) the NSCA 2016 is unconstitutional, null and void, and of no effect because it violates the freedom of movement guaranteed by art 9 of the Federal Constitution.

[14] The matter was then remitted to the High Court at Kuala Lumpur. During case management proceedings at the High Court, on 18 February 2020, the respondents took the position that the applicant's OS ought to be dismissed *in limine* on account of the decision by the majority in the reference hearing. The parties were then ordered to file written submissions on the issue. The decision of the High Court is now awaiting the disposal of the instant review application to this court, which application, as noted at the outset, was filed on 13 March 2020.

GROUNDS FOR REVIEW BY THE APPLICANT

[15] The applicant's grounds for review are twofold in that, firstly, there was a breach of natural justice as the applicant was not given the opportunity to be heard on the issue of whether the constitutional questions were abstract, academic and hypothetical. And secondly, the breach has resulted in a grave injustice for the applicant.

[16] The applicant argued, in essence, that he had no notice and was not given an opportunity to answer on the issue of whether the constitutional questions were abstract, academic and hypothetical. This issue was also never raised by the respondents in their written or oral submissions. This issue was also not put to the parties by the court during the reference. As he was not accorded the opportunity to submit on this issue, a breach of natural justice had resulted, which had also occasioned a grave injustice against him warranting a review intervention by this court. The applicant contended before us that if he was given an opportunity to be heard, he had a complete answer to the issue of whether the questions were abstract, academic and hypothetical.

[17] To this end, the applicant relied on the public law exception to the general rule that a court of law ought not to answer academic questions. So, even if a matter was considered academic by the court, the constitutionality of an oppressive security law ought to be determined as it comes within the public law exception. To support this proposition, reference was made to *R v Secretary of State for the Home Dept, ex parte Salem* [1999] 2 All ER 42 where the House of Lords, through the judgment of Lord Slynn, observed (at p 47):

> ... in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which directly affects the rights and obligations of the parties inter se.

[18] The present case, it was submitted, raises a public law issue on the constitutionality of the NSCA 2016 and remains a matter of general public importance for which a Member of Parliament like the applicant has a real and genuine interest in the matters raised in the OS. The public law issue of whether the NSCA 2016 is constitutional represents a serious dispute and a matter of actual controversy between the parties to be resolved.

[19] A further argument was made that the NSCA 2016 infringes on and denies key fundamental liberties guaranteed under Part II of the Federal Constitution. In this respect, the NSCA, inter alia, gives power to security forces to arrest without warrant, to stop and search anyone, to take possession of land and buildings, to impose curfew at will, and to dispense with an Inquest. The NSCA 2016 also infringes on the doctrine of separation of powers and gives absolute, wide ranging powers without limitation to the Prime Minister. It gives the sole discretion to the Prime Minister to declare any area as a security area. The NSCA 2016 also usurps the powers of the Yang di-Pertuan Agong and gives unlimited powers to the second respondent in the guise of national security.

[20] To further substantiate his arguments, the applicant relied on the cases of *Mega Sasa Sdn Bhd v Kinta Bakti Sdn Bhd & Ors* [2020] 10 MLJ 409; [2020] 4 CLJ 201; *Robert Linggi v The Government of Malaysia* [2011] 2 MLJ 741; [2011] 7 CLJ 373; *Manoharan a/l Malayalam & Anor v Dato' Seri Mohd Najib bin Tun Hj Abdul Razak & Ors* [2013] 5 MLJ 186; *Romesh Thappar v The State of Madras* 1950 SCR 594; *Chintaman Rao v The State of Madhya Pradeshram* 1950 SCR 759 and *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 as authority for the proposition that he has a real interest and the declarations sought are live issues as the law can be applied on the applicant and the public in general at any time. It was also not a matter superseded by subsequent events as was the case in *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4 MLJ 773; [2018] 10 CLJ

129 as the applicant can be granted the reliefs if the court agrees with him.

ARGUMENTS AGAINST REVIEW BY RESPONDENTS

[21] The respondents, in turn, did not contest the assertion by the applicant that he was not accorded the opportunity to submit on the issue of locus standi. They conceded that they had not raised the issue. Nevertheless, they submitted that the inherent powers of this court to review its own previous decision must be exercised sparingly and only on limited grounds and in exceptional circumstances.

[22] In this regard, the applicant must establish to the satisfaction of the court that on the facts, circumstances and the law applied in the impugned decision, an injustice or abuse of process had been occasioned which needs to be rectified or prevented. Relying on the principles set out by this court in *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 251; [2008] MLJU 1090; [2008] 6 CLJ 1 (FC) ('Asean Security'), it was urged upon us that there must be finality in deciding a dispute. It cannot be reviewed *ad infinitum.*

[23] It was further submitted that the applicant had failed to make out his case and the issue of breach of natural justice cannot be a ground for review. The majority, it was asserted, had arrived at the said decision based on their findings and application of the law to the facts and circumstances of the case.

[24] Additionally, the present case was remitted to the High Court for the final disposal of the OS. The learned High Court judge had, during a case management on 18 February 2020, directed parties to file submissions on the issue of whether the OS ought to be struck out based on the decision of this court. The hearing was now pending and it was contended that both parties have the opportunity to canvass this issue before the High Court.

ISSUES FOR DETERMINATION

[25] Following from the arguments raised by the parties, we can summarise the issues for our consideration as follows. Firstly, we will need to consider the circumstances under which the court of final appeal has jurisdiction to review its own decision. Secondly, it will be necessary to consider if a breach of natural justice falls or should fall within the limited grounds for establishing the jurisdiction for review. As is apparent, these two questions deal with the issue of jurisdiction. If jurisdiction is established, the third and final question is whether the applicant is entitled to the orders he is seeking. In this respect, it would be necessary to determine if a grave injustice had been occasioned by the breach of natural justice.

A REVIEW JURISDICTION: FINALITY V JUSTICE

[26] We begin our assessment with the first essential consideration of whether this court has the jurisdiction to review its decision in the instant matter. The enabling provision for a review is r 137 of the RFC 1995 which states:

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> Rule 137 Inherent powers of the Court
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> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

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[27] Following from the decision of this court in *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351 ('Dato' See Teow Chuan'), it is now settled that the Federal Court, being the highest court in the land, and the court of last resort, has the inherent jurisdiction, irrespective of any statutory provision, to prevent injustice and abuse of process. These are essentially the default powers which the court must have to facilitate its role as a court of law so as to ensure fairness in legal proceedings and prevent abuse of its process.

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[28] This inherent power, or some might even call it a duty or obligation, springs from an appreciation that the court is not just a court of law but also a court of justice. Lord Diplock in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at p 977 observed that the court must have such power 'in order to maintain its character as a court of justice'. As masters of their own procedure, the courts must have inherent jurisdiction to do justice where demanded by the facts and circumstances of each case. Clearly then, the apex court must have powers to correct its own errors. Seen in this light, r 137 of the RFC 1995 is really an embodiment of this principle.

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[29] Nevertheless, we have held on many previous occasions that this power to review can only be exercised in rare and exceptional circumstances. The power exists to prevent injustice and abuse of process which is apparent from the face of the record. The inherent power cannot be invoked to review its own decision on its merits as otherwise there will be no finality to litigation. It is in the public interest and the administration of justice that there be finality of proceedings (see *Asean Security*, *Dato' See Teow Chuan; Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd* [2019] 2 MLJ 609; *Halaman Perdana Sdn Bhd & Ors v Tasik Bayangan Sdn Bhd* [2014] 4 MLJ 1; and *TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) v Director of Forest,*

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Sarawak & Anor and other appeals [2019] 6 MLJ 141). A

[30] Some of the rare and exceptional circumstances in which the power to review can be exercised were restated in a recent decision of this court in *Bellajade Sdn Bhd v CME Group Bhd and another appeal* [2019] 5 MLJ 141 as follows: B

(a) that there was a lack of quorum or quorum failure, for example the court was not duly constituted as two of the three presiding judges had retired (*Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61); C

(b) where the decision had been obtained by fraud or suppression of material evidence (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577);

(c) where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction is not confined to the standing of the quorum that rendered the impugned decision (*Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd & another application* [2005] 3 MLJ 1; [2004] 4 CLJ 350); D

(d) clear infringement of the law (*Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006]1 MLJ 417; [2005] 1 CLJ 565); E

(e) where an application under r 137 of the RFC of the 1995 had not been heard by Federal Court and yet through no fault of his, an order was inadvertently made as if he had been heard (*Raja Prithwi Chand Law Choudhury v Sukhraj Rai* AIR 1941 FC 1); F

(f) where bias had been established (*Taylor and another v Lawrence and another* [2002] 2 All ER 353; [2002] EWCA Civ 90; [2003] QB 528);

(g) where it is demonstrated that the integrity of its earlier decision had been critically undermined, for example where the process had been corrupted and a wrong result might have been arrived at (*Re Uddin (a child) (serious injury: standard of proof)* [2005] 3 All ER 550); G

(h) where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and the Court of Appeal (*Joceline Tan Poh Choo & Ors v V Muthusamy* [2007] 6 MLJ 485); and H

(i) where the manner in which the apex court arrived at that previous decision constituted a breach of natural justice (*Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998; [2010] SGCA 39 at para 55, Singapore Court of Appeal) (Adapted from Tan Kee Heng, *Civil and Criminal Appeal in Malaysia* (3rd Ed) at pp 239–240). I

[31] The aforementioned are categories derived from the experience in various jurisdictions. These are the established categories but common sense dictates that they are not exhaustive as other categories may well emerge if supported by compelling and cogent reasons.

[32] What comes leaping to mind, however, from the possible exercise of the inherent jurisdiction as in the categories mentioned, are the competing claims of public interest, that is, between finality in litigation and prevention of injustice and abuse of process. There is no doubt a tension between the two principles as observed in *Dato' See Teow Chuan* and it remains a challenge in each case, where both claims are asserted, to intercede between the two and find the right balance.

[33] Be that as it may, it must be the case, in our view, that whilst the public interest in finality of litigation is of fundamental importance, in the rarest of circumstances where it is called for, the prevention of injustice must not take a backseat. In a case where the earlier decision has resulted in a grave injustice, it is not open to the court to fold its arms and say to the litigant: 'it is most unfortunate for you but we will do better next time'. In our view, where the circumstances so demand, justice must prevail over finality so as to preserve public confidence in the integrity of the administration of justice.

[34] In this regard, the sentiments expressed by the Supreme Court of India in the case of *Rupa Ashok Hurra v Ashok Hurra* (2002) 4 SCC 388 ('Rupa Ashok Hurra') merit careful attention (at para 42):

> 42. The concern of this Court for rendering justice in a cause is not less important than the principle of finality of its judgment. We are faced with competing principles — ensuring certainty and finality of a judgment of the Court of last resort and dispensing justice on reconsideration of a judgment on the ground that it is vitiated being in violation of the principles of natural justice or giving scope for apprehension of bias due to a Judge who participated in the decision-making process not disclosing his links with a party to the case, or on account of abuse of the process of the court. Such a judgment, far from ensuring finality, will always remain under the cloud of uncertainty. Almighty alone is the dispenser of absolute justice — a concept which is not disputed but by a few. We are of the view that although Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right the miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question, we are persuaded to hold that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essentially in the public interest that a final judgment of the final court in the country should not be open to challenge, yet there may be circumstances as

mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and would cause perpetuation of irremediable injustice.

[35] To surmise, we reaffirm the principle that a review of a judgment of a final court ought to be allowed only in rare and exceptional circumstances and on limited grounds established by case law. In appropriate cases, the grounds to do so can be extended where the facts and circumstances so demand. That this must be the case is due to the public interest of ensuring certainty and finality of a judgment of a final court.

[36] However, in the rarest of rare cases, where the final judgment complained of has caused grave injustice which is apparent from the face of the record, and which can lead to public misgivings about the administration of justice, the court hearing the application for review is obliged to rectify the error. In such a case, the public interest of ensuring justice is done must take precedence over the interest of certainty and finality. The reason for this is that a failure to remedy such injustice will undermine the overriding public interest that there should be confidence in the administration of justice (see *R v Gough* [1993] 2 All ER 724 at p 728).

PUBLIC CONFIDENCE IN THE JUSTICE SYSTEM

[37] So, of course, and not taking anything for granted, this begs the question — why should confidence take precedence? And, more importantly, how does it separate the two interests of finality and justice, both of which also affect confidence? Admittedly, 'public confidence in the judiciary' is not a term that all can agree on. It depends on who you ask. 'Confidence' in itself is closely connected with questions of trust, credibility and reputation, for example, like in an individual or in an institution or in the commercial world, of brands of products or services which have value as perceived by their customers.

[38] On a fundamental level, confidence in the justice system involves a belief in the fairness and impartiality of the courts. Short of conducting a poll on the citizenry, such belief is, however, not susceptible of exact proof. It may, in the end, be only a matter of perception, as how people perceive the justice system depends very much on how they perceive the decisions will affect them and the values which they cherish.

[39] Despite the seeming immeasurability or lack of agreement on a precise definition, we can at least identify with certitude, which we think is more useful, factors which lead to higher confidence and others which lead to lessened confidence and also factors which affect confidence more than others. So, for example, it cannot be doubted that delay in the disposal of court cases

A does little for confidence in the justice system. In the same way, a perception that the judiciary is not independent will lead to the same result. So, it can legitimately be posited that more independence means more confidence.

B **[40]** However, to take the examples further, a perception that there are dual standards of justice, one for the elite and powerful and another one for the ordinary people, will lead to wholesale distrust and derision. So, *a fortiori,* we can more readily accept that to condemn a person unheard will diminish confidence more so than breach of the finality principle.

C **[41]** Underpinning what we have just stated is the undoubted legal proposition that the judiciary is the constitutionally appointed guardian of the rule of law, the guardian of constitutional rights and, in the eyes of the general public, the guarantor of justice. This is an awesome duty, a formidable undertaking and, as many would expect, requiring the highest attributes. The Federal Constitution imposes on the judiciary a primary obligation to ensure that its provisions are not violated.

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E **[42]** Foremost of its duties in this regard is to protect the principle of separation of powers embodied in the Federal Constitution which, in turn, is indispensable to upholding the rule of law (see arts 4(1) and 121). The trilogy of recent judgments of this court also bear testimony to this (see *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1).

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G **[43]** Being also unelected, unlike the members of the legislative assembly, for example, it does not enjoy the legitimacy of popular election. It cannot be gainsaid that public support and confidence is critical for the proper and effective functioning of the administration of justice. It is apposite here to hearken back to the keen observation by renowned French novelist and playwright Honore de Balzac: 'To distrust the judiciary marks the beginning of the end of society'. A lack of trust will certainly weaken the institution and diminish its role in protecting the Federal Constitution. So, it is worth repeating, confidence is paramount.

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I **[44]** To be fair though, we are not unmindful that the public, or at least the fair-minded and well-informed members, do not, of course, expect that all judicial decisions are made with infinite wisdom. Given the limitations of human fragility and imperfection, and operating within the adversarial system that we practice, it is expected that errors are inevitable. Even so, it must remain a constant imperative that the guardians of the justice system be ever vigilant in maintaining and enhancing public confidence.

[45] It is in this connection, we say, that when plain errors have led to grave and manifest injustice, any rectification of those errors will enhance public confidence rather than diminish confidence for the violation of the finality principle. For this principal reason, justice must prevail over finality. When seen in this light, it can then be easily understood why there is, and rightly so, an overriding public interest of ensuring confidence in the integrity of the administration of justice.

BREACH OF NATURAL JUSTICE — A GROUND FOR REVIEW?

[46] Having now dealt with the law on review, the next question for our consideration is whether a breach of natural justice falls or should fall within the limited grounds for establishing the jurisdiction for review. As is now well-established, there are two aspects to the breach of natural justice principle. The first is the rule against bias and the second, the right to be heard. A breach of either of these rules essentially means the aggrieved party has been denied a fair and impartial hearing (see *B Surinder Singh Kanda v The Government of The Federation of Malaya* [1962] 1 MLJ 169 (PC)).

[47] The courts have had occasion to deal with the issue of breach of natural justice in some leading cases. In *Dato' See Teow Chuan*, the leading local case on the subject, the applicants, in a review application, contended that there was evidence of bias in the earlier judgment of the Federal Court. The applicants submitted that the evidence displaced the presumption of judicial integrity which encompassed impartiality and that it did not show that justice had been done thereby undermining public confidence in the integrity of the judicial system. Although the review application was dismissed, this court went on to hold (at p 352):

> (4) The Federal Court was clothed with inherent jurisdiction to remedy any injustice arising from procedural unfairness due to coram failure, breach of the rules of natural justice or if the decision was tainted by actual bias or a real danger of bias on the part of one or more members of the panel ...

[48] In *Taylor and another v Lawrence and another* [2002] 2 All ER 353; [2002] EWCA Civ 90; [2003] QB 528 ('Taylor v Lawrence'), the House of Lords dealt with the issue of reopening the case where bias was alleged in the following way:

> 55. One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly

established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations.

[49] Prior to *Taylor v Lawrence*, the House of Lords in the celebrated case of *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577; [2000] 1 AC 119; [1999] 2 WLR 272, also held that the power to rehear its case must be exercised in exceptional circumstances. In that case, the House of Lords, in view of the special circumstances of the case, exercised jurisdiction to rehear an appeal because of the alleged bias of one of the members of the House who first heard the appeal.

[50] The principle involving the right to a rehearing was fashioned by Lord Browne-Wilkinson in these terms (at pp 585–586):

> In principle, it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v Broome (No 2)* [1972] 2 All ER 849; [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
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> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

[51] In *Rupa Ashok Hurra*, the Supreme Court of India was also confronted with the issue of violation of the principles of natural justice in an application for review or reconsideration of an earlier order of the Supreme Court known there as a curative petition. Apart from what was alluded to earlier (at [34]), the Supreme Court also observed (at p 417):

> 51. Nevertheless, we think that a petitioner is entitled to relief *ex debito justitiae* if he establishes (1) violation of principles of natural justice in that he was not a party to the *lis* but the judgment adversely affected his interests or, if he was a party to the *lis,* he was not served with notice of the proceedings and the matter proceeded as if he had notice, and (2) where in the proceedings a learned judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner.

[52] Although the preceding cases alluded to were more concerned with the rule against bias, the next case concerns the breach of the hearing rule or the right to be heard. It is the Singapore Court of Appeal decision in *Management*

Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd [2011] 1 SLR 998; [2010] SGCA 39 ('MCST Plan No 301'). The applicant in that case contended that justice had not been done in the earlier 2008 Court of Appeal's ('2008 CA') decision because it had been denied the right to be heard on the *Arnold* exception to the res judicata principle, which, in its view, was pivotal to the 2008 CA's decision. The *Arnold* exception arises from the House of Lord's decision in *Arnold and others v National Westminister Bank Plc* [1991] 2 AC 93 which decided that res judicata was not absolute and there may arise special circumstances warranting an exception to res judicata. The exception was intended to serve the wider interests of justice. The argument in *MCST Plan No 301* was that if a right to be heard had been granted, the applicant could have persuaded the 2008 CA to decide otherwise.

[53] The main issue was whether the Court of Appeal had an inherent jurisdiction to reopen and set aside its own decision made in breach of natural justice. The court decided as follows (at p 1042):

> The CA has inherent jurisdiction to reopen and set aside its own decisions made in breach of natural justice and rehear the matters dealt with in such decisions. How this jurisdiction is to be exercised depends on the nature of the breach — a breach of the bias rule will entitle the aggrieved party to have the judgment set aside *ex debito justitiae* and the matters dealt with therein reheard, whilst a breach of the hearing rule will (in appropriate cases) entitle the aggrieved party to a hearing on the matters on which he was not heard, with the court deciding only after such a hearing whether the impugned judgment is to be set aside.

[54] The court took the view that if an issue was decided in breach of natural justice, it cannot be said that the court was fully apprised or informed of all the relevant considerations pertaining to the issue and cannot then be said to have applied its mind judicially to that issue. The court also held that if a hearing on those matters will not change the ultimate outcome of the case, then the hearing will be in vain and an exercise in futility. In that case, a rehearing on such matters will not be granted. In the case itself, the court held the grant of any such order will not serve any purpose and the appeal was dismissed.

[55] Having the benefit of the case authorities as outlined in the foregoing discussion and the reasoning applied in those cases, we considered it appropriate, both on principle and authority, that breach of natural justice, whether it be on the bias rule or the right to be heard rule, ought to be one of the matters to be included in the limited list for the court of last resort to exercise its jurisdiction to review its previous decision.

[56] As we had indicated earlier, not having such jurisdiction in the case of breach of natural justice will effectively mean the court is deprived of the opportunity to rectify its own error and prevent injustice. As succinctly

observed by the Singapore Court of Appeal in *MCST Plan No 301*, at p 1025, to circumscribe the inherent jurisdiction 'could potentially result in the court turning a blind eye to an injustice caused by its own error in failing to observe the rules of natural justice'.

WHETHER APPLICANT ENTITLED TO A REVIEW

[57] Having dealt with the issue of jurisdiction, we now come to the final question of whether the applicant ought to be entitled to the orders he is seeking. In particular, the question is whether there has been any breach of natural justice and whether the facts and circumstances in the case entitles him to the declarations sought.

[58] We have dealt briefly with the rules of natural justice in the previous discussion (at [46]). We had adverted to the two rules of natural justice. The first was the rule against bias (*nemo judex in causa sua*) or the rule that no one may act as a judge in his own cause. The second is that no person should be condemned unheard or without prior notice of the allegations against him (*audi alteram partem*). The instant case is only concerned with the *audi alteram partem* rule.

[59] In principle, the rules of natural justice, in the broadest sense, are concerned with the duty to act fairly (see *Ridge v Baldwin and others* [1964] AC 40 at p 77). They form the procedural aspect of the rule of law. As noted by this court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at p 315, procedural fairness is incorporated in arts 5(1) and 8(1) of the Federal Constitution. In short, their formulation seeks to set out a minimum standard of procedural fairness. So, the *audi alteram partem* rule, in essence, requires that no person shall be penalised by decisions which affect him or her without prior notice of the case and a fair opportunity to answer and present his or her case. It also seeks to reinforce the old aphorism but yet a fundamental principle — 'justice must be done and seen to be done' (per Lord Hewart CJ in *R v Sussex Justices, ex parte McCarthy* [1923] All ER Rep 233 at p 234) as surely justice cannot be seen to be done if a person is condemned unheard.

[60] The *audi alteram principle* is now well-established in its application to all cases where an aggrieved person is adversely affected by an administrative action whether they are labelled as 'judicial', 'quasi-judicial' or 'administrative' and irrespective of whether the enabling statute makes provision for a hearing (see *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 at p 154; *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141; [2020] 1 CLJ 1).

[61] In the context of judicial proceedings, this rule was restated by Lord

Diplock in *Hadmor Productions Ltd and others v Hamilton and others* [1982] 1 All ER 1042 as follows (at p 1056):

> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right to be informed of any point adverse to him that is going to be relied on by the judge and to be given an opportunity of stating what his answer to it is.

[62] An order made in breach of this rule could be set aside as was the case in *B Surinder Singh Kanda v The Government of the Federation of Malaya*. This was a case where the appellant, who was an Inspector of Police in the Royal Federation of Malaya Police Force, had been dismissed on the grounds of various acts of indiscipline. It transpired that during the disciplinary proceedings, he was not supplied with a copy of a prejudicial report by the Board of Inquiry which report was made available to the adjudicating officer prior to the proceedings. The Privy Council held that the proceedings had failed to provide him a reasonable opportunity of being heard. The order of dismissal was set aside.

[63] In delivering the judgment of the Committee, Lord Denning said (at p 173):

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.

[64] In the context of ensuring fairness in judicial proceedings, parallels could be drawn with the pleadings rule in civil proceedings. Parties are bound by their pleadings and the court will normally be reluctant to entertain issues outside the pleadings unless, of course, matters such as jurisdiction or illegality are raised. The objective is to maintain fairness and justice so that parties are not taken by surprise if new matters, not raised in the pleadings, are taken up at the trial or later during the appeal (see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; and *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428). So, whilst the pleading principle is not predominantly applicable to the current proceedings, it does at least demonstrate the importance of treating parties fairly throughout the course of proceedings.

[65] The importance of this principle was reiterated by the Privy Council in an appeal from the Court of Appeal, Hong Kong in the case of *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 HKC 625. In that case, an interpretation of the *force majeure* clause in the contract for delivery of goods was not raised by the parties but introduced by the Court of Appeal. The Privy

Council held (at the headnotes):

(2) If the Court of Appeal's holding that, in the circumstances, the *force majeure* clause was not in Jaw effective to excuse the under-delivery, had been exposed to argument, it may be that the law would have been differently stated. The cases on this question were not straightforward and it was possible that closer scrutiny would have lead the Court to a reading which allowed the sellers the benefit of the clause, even on the assumed facts. In any event, the sellers had no opportunity to test the proposition which defeated their defence.

(3) The introduction by the Court of Appeal of an entirely new question of law and fact was impermissible and its decision on this point could not stand. If the matter had been ventilated in open court it would soon have become apparent that there had been insufficient exploration of the facts at the trial to permit the application of whatever law might have emerged from an examination of the authorities. The course taken deprived the sellers not only of the opportunity to argue the point on the merits, but also of an unanswerable objection on procedural grounds. *The Tasmania* (1890) 15 App Cas 223, *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 and *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218 applied.

(4) The occasions when an appellate court would find it proper even to contemplate introducing a new question of law and fact were rare, but if it were ever to do so, the first step must always be to have the matter thoroughly explored by adversarial means, as regards not simply the merits of the new question but also the propriety of entering upon it at all.

[66] It is nevertheless trite that this court is not limited to the framed issues but has jurisdiction to raise new issues of law and fact on its own which are related to the issues at hand. We can do so on matters that are relevant for the purpose of doing complete justice according to the substantial merits of the case (see *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337; and *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97). The courts can also exercise its general discretion to entertain questions of law raised for the first time in the interests of justice (see *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah* [2018] 12 MLJ 49 (FC); *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1). We must hasten to add that these were instances where the parties were given the opportunity to raise objections and the opportunity to respond to the new issues raised. A useful guide which is often used is to frame the questions to be presented to the parties who could then be given time to advance further submissions on the new questions.

[67] To recapitulate the facts in the present case, locus standi was initially one of the issues for consideration by the High Court. However, once the matter was remitted to the High Court, the applicant filed a reference application for

the same to be transmitted to this court pursuant to s 84 of the CJA 1964. It is pertinent that no objection was raised by the respondents. Apparently, both parties were eager for the constitutional questions to be decided as framed and the issue of locus standi, which normally ought to be considered and decided as a preliminary issue, was left abandoned. So, the learned judge quite rightly agreed to the application and stated a special case to this court.

[68] When the matter came up before this court, it made perfect sense that neither party raised the issue of locus standi. There were no submissions on this point and no case authorities were forwarded for the court's consideration as well. As far as the parties were concerned, this was not a live issue as it had been abandoned in the High Court itself. The parties, it would appear, were fully focused on the issue of constitutionality of the NSCA 2016.

[69] In short, it was not disputed by the respondents that this specific issue of locus standi was never raised either by the court or the parties. The only issue raised by the court was whether the requirements of s 84 of the CJA 1964 had been met and whether the court was bound to answer the questions. This is further supported by the fact that the notes of proceedings did not indicate that this issue was raised by the court. We also noted that as both learned counsel and learned senior federal counsel ('SFC') were present at the earlier hearing, it is highly unlikely that they could be mistaken either.

[70] Having made this observation, it had also occurred to us that it was not just the majority but also the minority who had alluded to the issue of locus standi in their respective separate judgments. As to why this was the case, perhaps the dissenting judgment of Tengku Maimun bt Tuan Mat CJ offers a clue when Her Ladyship made the following observation in the paragraphs stated:

> [29] The respondents objected to the appellant's locus standi at the initial hearing before the High Court. However, the objection seems to have been abandoned when the matter was remitted to the High Court and also when it came up for hearing before us. I agree that the Indian cases cited by the CJSS correctly state that locus standi cannot be waived. This is because locus standi is a common law rule invented by the courts to shut out meddlesome interlopers or frivolous suits thereby protecting the process of justice from abuse. Whether the courts ought to relax the rule will depend on the facts and circumstances of each case.
>
> [30] In my view this is a suitable case to relax the locus standi rule. The Attorney General's Chambers has willingly agreed to defend the law that they were responsible for drafting and I see no reason why the court, atthis stage, ought to deny the appellant the right to ventilate his claim when the Government themselves are willing to defend it on the merits.

[71] In the dissenting judgment of David Wong Dak Wah CJSS, an

observation in similar vein was made at para [92] of the judgment as follows:

> [92] Earlier on I have stated that the issue of locus standi is a non-issue for there was no such objection by the respondents during the substantive hearing of this reference as can be seen from the submission of the learned senior federal counsel. Be that as it may, prudence dictates that we deal with this matter so that all grounds are covered.

[72] The observation of the majority, in this regard, was noted earlier in para [12] of this judgment. From our perusal of the judgments, it seems to us that the questions raised by the court in the earlier hearing was with regard to whether the requirements of s 84 of the CJA 1964 had been met in that whether there needs to be any 'pending proceedings' independent of the reference at the High Court before s 84 comes into play. In other words, can this court determine an issue *in vacuo* or in the abstract since the only issue before the High Court were the constitutional questions, and once the questions were decided, the matter ends there given there were no other factual disputes between the parties.

[73] Nonetheless, it seemed to us that in the end, at least as evident in the majority judgment, the whole matter evolved into a consideration of whether the applicant had the standing to bring the action since he had not shown how he was adversely affected in the sense that he had a real and genuine interest in the subject matter. This was in effect, as noted by the majority, the test of locus standi and was intertwined with the question of whether there was a real and actual controversy. In the end, the majority held the applicant had not satisfied this test and, in declining to answer the constitutional questions, decided that the questions posed were abstract, academic and hypothetical.

[74] As was required of us, and as evident in the preceding segment, we had taken great pains to ascertain with precision as to whether the complaints by the applicant of a breach of natural justice had any merit. In this respect, it is at least clear to us that on the issues decided by the majority, the applicant was not given notice as well as the opportunity to answer the issues of whether the constitutional questions were academic and his locus standi to bring the action. In the circumstances, we were persuaded that a case for breach of natural justice had been made out by the applicant in that the *audi alteram partem* rule had not been observed. That, however, is not the end of the matter.

WHETHER GRAVE INJUSTICE ESTABLISHED

[75] The jurisprudence that we have alluded to thus far indicates that in order to be entitled to the orders he is seeking, the applicant must establish that with the breach of natural justice, he has suffered grave injustice. It follows that

it is not in all cases of breach of natural justice that a justification can be made for resorting to the exceptional course of reopening proceedings already heard and decided.

[76] A pivotal consideration, in our assessment, is whether the injustice is substantial and whether the aggrieved person has been left without any effective alternative remedy. The availability of an alternative remedy, as we had observed earlier, is essential to maintain confidence in the integrity of the administration of justice. Other factors to consider are to what extent the aggrieved party is the author of his own misfortune, and also, how will a rehearing affect others (see *Taylor v Lawrence*). In appropriate cases, the court may also consider whether a rehearing would be an exercise in futility if the outcome would have been the same in any event if the aggrieved person had been granted a full and fair hearing (see *MCST Plan No 301*).

[77] Now, what is 'injustice' as envisaged by r 137 of the RFC 1995, was considered by this court in *Asean Security*, by Zaki Tun Azmi PCA (later CJ) in the following fashion:

> [44] Now, 'justice' is a very wide and general term. Jurists through the years since Aristotle and Plato have tried to define justice and each has his own definition. It is not necessary for me to delve into that for the purpose of this judgment. Any party who has lost a case will always claim that there has been injustice against him while the successful party will plead otherwise. In our system, the court's function is to hear and decide to the best of its ability, honestly, and after carefully considering all the evidence adduced before it, makes a decision. Based on its findings and applying the law as the judge understands, he arrives at his conclusion. That to my mind, in the context of this case, is justice. The decision may not be accepted by the unsuccessful party. But that is the best that an honest and an impartial judge can decide.

[78] So, injustice is not what a litigant may perceive after a full and final hearing as litigants may be prone to cry 'injustice' if they do not secure the desired outcome. It must then be something outside of the merits of the case and one which is plain and obvious from the face of the record. For if it were to be otherwise, the respondents here could also claim injustice as the denial of the public interest in finality of proceedings may affect them adversely.

[79] In the present case, though, we noted that the injustice was firmly established in that the applicant was not given notice as well as an opportunity to answer the issue of whether the constitutional questions were academic and the consequent issue of locus standi. We accepted, however, as noted earlier, that if he was not left without a remedy, then he could not be said to have been substantially prejudiced.

[80] Taking the cue, the learned SFC argued that since the matter is now before the High Court, both parties can still canvass this issue there. The High Court had since instructed parties to provide written submissions on whether the OS ought to be struck out based on the decision of this court. What the learned SFC is essentially saying is that the issue of locus standi is still a live issue before the High Court and that there is therefore no prejudice or injustice to the applicant.

[81] With respect, this argument is quite disingenuous and rather lacking in candour and consistency. To our minds, this argument is reminiscent of running two diverse arguments before two different courts on an identical issue. Before us, the learned SFC is saying that the issue of locus standi is a live issue in the High Court but in the High Court, she is taking the position that the OS ought to be dismissed without further ado or without any further hearing in light of the majority's decision on the issue. Or perhaps she is attempting to say, as we understand it, it is still a live issue as the learned judge may not agree with the respondents' position.

[82] At any rate, we did not think the High Court has any discretion as the only matter left before the court are the constitutional questions and since they have been rendered academic by the majority decision, the only order that can be made is an order of dismissal of the action. Although the perfected order of this court only states that it has declined to answer the questions posed in the reference, the grounds of judgment state in no uncertain terms that the constitutional questions referred to it are abstract and purely academic as there was no real dispute underlying them. The High Court is bound by this judgment and cannot decide in a different fashion. In short, as rightly depicted by learned counsel by the applicant, it is a *fait accompli.*

[83] It is also relevant to note that s 85 of the CJA 1964 states that the High Court 'shall continue and dispose of the proceedings in accordance with the judgment of the Federal Court and otherwise according to law'. 'Judgment' here must mean not only the extracted order but the grounds of judgment of the court as that is the best and most logical way for the High Court to continue and dispose of the proceedings before the court.

[84] So, in our judgment, injustice has been established by the applicant as not only has he not been heard on the issue which was ruled against him, he has now been left with no other remedy. He is not entitled to file any further proceedings on the same issue as the matter is res judicata. In fact, the majority indicated that only a person whose rights have been adversely affected or threatened to be affected can challenge the constitutionality of the NSCA 2016 (see para 62 of the majority judgment). So, in effect, not only the applicant but any other person similarly circumstanced as the applicant will be estopped

from doing so. As reiterated earlier, the breach of a right to be heard without an effective alternative remedy will erode confidence in the integrity of the administration of justice (see paras [35]–[40]).

[85] Finally, we also considered whether an order for a rehearing will be an exercise in futility. In this connection, we had alluded to *MCST Plan No 301* (at para [50]), where the Singapore Court of Appeal had declined to order a rehearing even though the applicant was not heard on an issue decided by an earlier court. The court took the view that the grant of any such order will not serve any useful purpose for the reasons set out in paras [66]–[67] of that judgment and the appeal was dismissed.

[86] In our judgment, this question does not arise in the present case in view of the attendant facts and circumstances. We were in no position to decide, at this point, if the outcome would have been the same if the applicant had been heard on the issue. We only had the submissions of the applicant. The respondents had chosen not to submit on this issue. It would have been awkward for them to do so having abandoned the issue throughout the proceedings.

[87] We can only say, bearing in mind that this issue is to be re-litigated, that the arguments advanced by the application in relation to the issue of locus standi could not be dismissed offhand as they merited serious consideration. Taking into account that in the two dissenting judgments, for their respective reasons, it was found that the questions referred to were not academic and the applicant had locus standi lends credence to the applicant's position that this particular issue merited at least full and serious arguments with the benefit of submissions by both parties.

[88] In the premises, we could hardly think reopening the matter would have been an exercise in futility. To be fair, the respondents were not asserting so in this application and had, in fact, not argued on the issue of locus standi at all in their oral and written submissions. In view of the order for rehearing, except for noting that full arguments are warranted on this issue, we ought to leave it at that and say no more.

CONCLUSION

[89] In summary, and for the reasons we have stated, it is our judgment that the Federal Court, being the court of last resort, has the jurisdiction and power to review its own decisions in the case of breach of natural justice, whether it is a case of a breach of the bias rule or the breach of the right to be heard. In the circumstances of this case, the applicant has established that there was a breach of the right to be heard which had resulted in a grave injustice to him.

[90] Although we appreciated that our jurisdiction to review is extremely limited and may only be exercised in very exceptional circumstances, we were mindful that there may arise exceptional circumstances where the public interest of ensuring justice is done must take precedence over the interest of certainty and finality. This would also be in keeping with the overriding public interest that there should be confidence in the administration of justice.

[91] In the circumstances, we were compelled to the conclusion that this was a fit and proper case to exercise our discretion in favour of allowing the application for a rehearing. Accordingly, the application in encl 1 was granted in that the whole of the decisions of this court dated 11 February 2020 were set aside and the special case fixed for rehearing. As is usual in cases of this nature, we made no order as to costs.

Application granted with no order as to costs; FC's decision set aside; special case ordered to be fixed for rehearing.

Reported by Dzulqarnain bin Ab Fatar